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October 31, 2002

VIA FEDERAL EXPRESS

Commission's Secretary
Office of the Secretary
Federal Communications Commission
9300 East Hampton Drive
Capital Heights, MD 20743

Re: CC Docket No. 01-92

Dear Secretary:

Enclosed is an original and four copies of the Reply Comments of the Nebraska Rural Independent Companies for filing in the above-referenced docket. Also enclosed is an additional copy that **we** would ask that you please file-stamp and return to the undersigned in the enclosed self-addressed, stamped envelope.

Very truly yours,

Kelly R. Dahl
FOR THE FIRM

KRD/eam
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Enclosures

cc: (w/enc. - via Federal Express)

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Developing a Unified Intercarrier Compensation Regime	)	CC Docket No. 01-92
	)	

REPLY COMMENTS OF
THE NEBRASKA RURAL INDEPENDENT COMPANIES

I. Introduction

The Nebraska Rural Independent Companies' (the "Nebraska Companies") respectfully submit their reply comments in the above captioned proceeding seeking comment on petitions for declaratory ruling regarding intercarrier compensation for wireless traffic. The Nebraska Companies will address comments filed on October **18,** 2002 in the Petition for Declaratory Ruling (the "Petition")[2] filed by T-Mobile **USA,** Inc., Western Wireless Corporation, Nextel Communications, Inc., and Nextel Partners, Inc. (the "CMRS Petitioners"). The CMRS Petitioners request the Federal Communications Commission (the "Commission") to direct incumbent local exchange carriers ("ILECs") to withdraw any wireless termination tariffs in

[1] Companies submitting these collective comments include: Arlington Telephone Company, The Blair Telephone Company, Clarks Telecommunications Co., Consolidated Telephone Company, Consolidated Telco, Inc., Consolidated Telecom, Inc., Eastern Nebraska Telephone Company, Great Plains Communications, Inc., Hershey Cooperative Telephone Company, Inc., Nebraska Central Telephone Company, Northeast Nebraska Telephone Co., Rock County Telephone Company, and the Nebraska Independent Telephone Association, a trade organization representing 38 member small rural telephone companies in Nebraska.

[2] ***See Petition for Declaratory Ruling: Lawfulness of Incumbent Local Exchange Carrier Wireless Termination Tariffs***, CC Docket No. 01-92, ***Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers,*** CC Docket No. 95-185, ***Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,*** CC Docket No. 96-98. Petition for Declaratory Ruling ***("Petition")*** filed September **6,** 2002.

existence today, or alternatively, to declare such tariffs unlawful, void and of no effect. The Nebraska Companies will explain more fully in these reply comments why parties that filed in support of the CMRS Petitioners' Petition for Declaratory Ruling misrepresent the facts in an attempt to continue to deprive the Nebraska Companies and other rural ILECs from recovering from the CMRS Petitioners the costs associated with the transport and termination of wireless traffic. Given the number of rural ILECs and associations commenting against this Petition; the Commission must recognize the lack of compensation for transport and termination from CMRS carriers has been a long-standing problem for rural ILECs across the nation. Denying the Petition is an initial step towards resolving this issue.

II. Parties That Have Filed Comments In Favor Of Bill-And-Keep Ignore The Rural ILECs' Legal Rights Under The Act And The Commission's Rules.

Qwest suggests that if the CMRS Petitioners exchange a small amount of traffic with many rural ILECs, it may not be efficient for the rural ILEC and the CMRS provider to negotiate individual agreements and that the adoption of Qwest's bill-and-keep proposal would avoid the need for negotiations between carriers exchanging relatively small amounts of traffic.[4] Thus, according to Qwest, in the absence of an intercarrier compensation agreement, the Commission

[3] For example, the Nebraska Companies submitting these comments represents **38** member rural telephone companies in Nebraska. The National Telecommunications Cooperative Association filed comments representing the interests of more than *556* rural rate-of-return regulated incumbent local exchange carriers. The Organization For The Promotion and Advancement of Small Telecommunications Companies filed comments representing the interests of over 500 small telecommunications carriers serving rural areas of the United States. The South Dakota Telephone Association filed comments representing the interests of 30 independent local exchange carriers in South Dakota. Other associations and organizations have filed comments representing the interests of small ILECs from the states Georgia, Iowa, Missouri, Oklahoma, Kansas, Minnesota, Montana, Ohio, Wisconsin, Arkansas, Indiana, Alabama, Pennsylvania, Illinois, Oregon, New Hampshire and Massachusetts.

[4] *In the Mutter of Developing a Unified Intercurrier Compensation Regime,* CC Docket No. 01-92, Comments of Qwest Communications International, Inc., October **18,2002,** at p. **3.**

should establish that bill-and-keep will apply for traffic exchanged between LECs and CMRS providers.'

Qwest's recommendation ignores the language of the Act which establishes reciprocal compensation arrangements for the transport and termination of telecommunications traffic and the duty to provide facilities for interconnection on rates that are just and reasonable in accordance with Section 252 of the Act. Further, as OPASTCO correctly explains, bill-and-keep is explicitly addressed in Section 51.713 of the Commission's rules, and the plain language of this section in no way imposes bill-and-keep in the absence of an agreement. State commissions have the option of imposing bill-and-keep under Section 51.713 under limited circumstances, that is, when the state commission has determined that the traffic exchanged between the networks is roughly balanced and is expected to remain balanced. Bill-and-keep arrangements only comport with the Act when they are agreed to by the carriers involved or are actively imposed by state commissions following established procedures.[6] An automatic default to bill-and-keep virtually assures that CMRS providers will do nothing, or will manipulate the negotiation process, such that this no compensation scheme will be imposed on the ILECs,[7] regardless of the volume of traffic exchanged.

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[5] *Id*. at p. 8.

[6] ***In the Matter of Developing a Unified Intercarrier Compensation Regime,*** CC Docket No. 01-92, Comments of the Organization for the Advancement of Small Telecommunications Companies, October 18, 2002, at pp.7-8.

[7] *In* ***the Mutter of Developing a Unified Intercarrier Compensation Regime,*** CC Docket No. 01-92, Comments of the ICORE Companies, October 18,2002, at p. 7.

III. Assertions That The Rates Are "Extra-compensatory'' Are Without Support And CMRS Carriers Can Remedy Any Such Deficiency In A Tariff By Invoking Its Rights Under Sections 251 and 252 Of The Act.

The Cellular Telecommunications & Internet Association ("CTIA) claims that the tariff rates are well above those permitted by the Commission.* Qwest maintains that the terminating carrier often has both the incentive and the ability to charge "extra-compensatory'' rates to other carriers unless regulators step in to cap the rates.' Neither CTIA nor Qwest submitted evidence in comments to support its assertions that the rates are "extra-compensatory", let alone provided a legal or economic analysis by which to determine and prove such assertions.

Further, such unsupported assertions are contrary to the findings of the Public Service Commission of the State of Missouri in Case Number TT-2001-139 as well of the Findings of Fact, Conclusions of Law, and Judgement in the Circuit Court of Cole County in the State of Missouri. In Case No. TT-2001-139, a group of small Missouri ILECs filed wireless termination tariffs to address a situation whereby CMRS carriers failed to establish agreements with the small ILECs for the use of the small ILECs' facilities. The rates that were filed were lower than small ILECs' forward-looking economic costs of providing service as developed using the HAI forward looking cost model. The Missouri Public Service Commission (the "MoPSC") approved the rates after an evidentiary hearing. The MoPSC found that the small ILECs' costs are high and that these costs are reflected in the proposed rates. The MoPSC further found that rates are not

[8] *In **the Matter of Developing a Unified Intercarrier Compensation Regime,*** CC Docket No. 01-92, Comments of the Cellular Telecommunications & Internet Association, October 18, 2002, at p. 5.

[9] *See **Qwest Comments,*** at p. 4.

so high as to be "facially outrageous" and that the record shows that the small ILECs rates are just and reasonable."

On Appeal, the Circuit Court of Cole County in the State of Missouri found that the small ILECs' proposed rates are not out of line with their forward-looking costs or the rates that the wireless carriers have negotiated with small companies in other states. The Circuit Court found the small ILECs' proposed rates were just and reasonable.

If CTIA, Qwest, or the CMRS Petitioners believe that an agreement reached through negotiations and possible arbitration will result in rates lower than those rates as filed in the tariffs, presumably they will take advantage of their rights under the Act and request such negotiations.

IV. Arguments Of Insignificant Traffic Volumes Lends Support To The Approval Of the Rural ILECs' Tariffs.

Qwest's arguments that the CMRS Petitioners apparently exchange such a small amount of traffic with many rural ILECs that it may not be efficient for the rural ILEC and the CMRS provider to negotiate individual interconnection agreements" lend support to the filing of rural ILEC tariffs.

The CMRS Petitioners stated in the Petition that some small ILECs have decided they want to receive compensation despite the small volume of traffic exchanged, even though the dollars involved do not justify the time and expense associated with negotiating an individual

[10] *In the* ***Matter of Murk Twain Rural Telephone Company's Proposed*** *Tariff to* ***Introduce Its Wireless*** *Termination* ***Services,*** Before the Public Service Commission of the State of Missouri, Case No. TT-2001-139, Issue Date, February 8,2001.

[11] *See Qwest* ***Comments,*** at **p.** 3

interconnection agreement." The Nebraska Companies maintain that the small ILECs' tariff filings will serve the CMRS Petitioners and the small ILECs' interests. Such a filing will save the CMRS Petitioners the time and expense involved with negotiating an interconnection contract and will allow the small ILECs to receive compensation for what the CMRS Petitioners consider to be a small volume of traffic. It is worth noting, that what may be small volumes to a large CMRS carrier are not necessarily small to a rural ILEC. Once the volume of traffic exchanged is sufficient to justify the process of negotiations, the CMRS Petitioners can exercise their rights under the Act by requesting negotiations.

As OPASTCO has correctly concluded, if entering into negotiations with rural carriers is not a worthwhile undertaking for large wireless providers, then wireless termination tariffs should be available as an option to allow these carriers to avoid the undertaking of negotiations with the rural carriers. Each CMRS provider should make the business decision of whether to abide by the tariff rate, or request negotiations, based upon its own particular circumstances. Either way, the rural ILECs have the legal right to receive just and reasonable compensation for the termination of traffic on their networks.[13]

V. The Commission's Jurisdiction To Establish Rules For Interconnection Under Section 251 And Section 252 Of The Act Does Not Preclude A State From Adopting A Tariff In The Absence Of An Agreement.

AT&T Wireless Services, Inc., ("AT&T Wireless") suggests that the Commission has jurisdiction to establish rules governing interconnection agreements between CMRS carriers and LECs and argues that such authority precludes state commissions from adopting tariffs for

[12] *See the Petition,* at p. 4.

[13] **See** *OPASTCO Comments,* at pp. 5-6.

wireless termination services.[14] However, AT&T Wireless cites no authority that would support such a proposition. AT&T Wireless merely suggests that Section 2(b) of the Act does not preclude Commission jurisdiction with respect to establishing rules governing interconnection agreements between CMRS carriers and LECs. The authority to establish rules governing the method by which interconnection agreements may be established under Sections 251 and 252 of the Act is not relevant to the question of whether states have the power under the Act to approve tariffs in the absence of such an agreement.

VI. The Assertion That The Petitioners Cannot Negotiate Interconnection Agreements If The Rural ILECs Are Permitted To File Tariffs Is Absurd.

CTIA maintains that the CMRS Petitioners are willing to negotiate interconnection agreements with the ILECs, but they cannot do so if the incumbents are permitted to simply file tariffs.[15]

Cingular Wireless maintains that ILECs' filing of wireless termination tariffs has made negotiation of lawful and reasonable agreements for termination and transport of CMRS traffic all but impossible and the structure created by Sections 251 and 252 is effectively undone by such unilateral tariff filings.[16] Cingular Wireless' arguments are without any legal reasoning. If negotiations fail to resolve any issue, Cingular Wireless as well as any CMRS provider or any party to the negotiations may exercise its rights under Section 252(b) of the Act by petitioning

[14] ***In the Matter of Developing a Unified Intercarrier Compensation Regime,*** Comments of AT&T Wireless Services, Inc., October **18,** 2002, at pp. 5-6.

[15] ***See CTIA Comments,*** at p. 2.

[16] ***In the Matter of Developing a Unified Intercarrier Compensation Regime,*** CC Docket No. 01-92, Supporting Comments of Cingular Wireless LLC, October 18, 2002, at p. 6.

the state commission to arbitrate any open issue including the charges for transport and termination as required in Section 252(d)(1)(B)(2) of the Act.

CTIA, Cingular Wireless, and the CMRS Petitioners all fail to recognize the express provision in many if not all of the tariffs filed, which state that the tariff applies except as otherwise provided in an interconnection agreement between a CMRS provider and the telephone company approved by the state commission pursuant to the Act. For any party to allege that the tariffs preempt interconnection negotiations, including the right to petition the state commission for arbitration, when the express provision clearly indicates otherwise, is absurd.

Cingular Wireless states that some of the 29 LECs in Missouri that have filed wireless tariffs are now in negotiations with CMRS providers. Cingular Wireless concludes that since the rate negotiated by the rural ILECs is identical to the tariff rates, it somehow proves that filing a tariff will provide no incentive for the ILEC to bargain in good faith.

Cingular Wireless fails to address that these referenced ILECs, as discussed in Section III of these reply comments, have submitted the results of a forward-looking economic cost ("FLEC") study in testimony before the MoPSC. The results of the FLEC study demonstrated that the rates filed in the tariff were in fact lower than the rates based on FLEC. Therefore, the negotiated rate as used by the Missouri ILECs is in fact lower then what would result if either party were to petition the MoPSC for arbitration under Section 252 of the Act.

It is apparent that Cingular Wireless and the CMRS Petitioners oppose the tariff for the same reason they have been reluctant to commence negotiations. That is, they are unwilling to pay the rural ILECs' cost of terminating their wireless traffic to the rural ILEC network, regardless of the pricing standards used to determine the cost.

VII. Imposing A Default Bill-And-Keep Rule And/Or Eliminating The Current Access Charge Regime As A Means To Eliminate The Disparity Between The CMRS Carriers And IXCs Would Be Contrary To The Communications Act.

AT&T Corp. ("AT&T") in its comments states that the Commission should grant T-Mobile's petition for declaratory ruling, but only if it applies T-Mobile's proposal to all carriers, not just CMRS carriers.[17] According to AT&T, adopting a default bill-and-keep rule only for CMRS carriers would exacerbate the existing competitive imbalance because the IXCs would have to pay access charges to terminate the same calls. AT&T believes this is another example of why the Commission should eliminate the more fundamental disparity that currently exists in the Commission's rules-*i.e.,* that CMRS carriers are entitled to terminate any call within a Major Trading Area subject to Section 251(b)(5) reciprocal compensation rules, while IXCs must pay access charges to terminate interLATA intraMTA calls.

As explained in Section II above, imposition of a default bill-and-keep rule would be contrary to the Act and Commission rules. As AT&T correctly suggests, IXCs must pay access charges to terminate interLATA intraMTA calls. Such an arrangement is in conformance with Section 251(g) of the Act, which encompasses Congress' intent to preserve the existing access charge regime.

The Nebraska Companies disagree with AT&T that the Commission should or can eliminate the Act's various compensation regimes. The Nebraska Companies maintain that it is not the Act's various compensation regimes that are exacerbating the existing competitive imbalance between the CMRS carriers and their IXC competitors. Rather, it is the CMRS

[17] *In **the Matter of Developing a Unified Intercarrier Compensation Regime,*** CC Docket No. 01-92, **Comments** of AT&T Corp, October 18, 2002, **at** p. 4.

carriers' action of unilateral imposition of bill-and-keep that is contrary to the Act and Commission rules; this is at the heart of the competitive imbalance between the CMRS carriers and their IXC competitors. There are two actions that can rectify the fundamental disparity that exists: First, the Commission can deny the Petition for Declaratory Ruling and, second, the CMRS carriers can comply with the Act by requesting to negotiate with the rural ILECs for transport and termination.

VIII. Parties That Have Filed Comments In Support Of The Petition For Declaratory Ruling Make Convoluted Arguments In An Attempt To Shift Responsibility Of The Lack Of Agreements From The CMRS Carriers To The Rural ILECs As A Means To Dispute The Legality Of The Rural ILECs' Tariffs.

CTIA states that the Commission has made it clear that LECs are required to negotiate in good faith with CMRS providers.[18] According to CTIA, the Petition is not about bill-and-keep, nor is it about indirect interconnection. CTIA contends that the Petitioners have made it clear their willingness to negotiate interconnection agreements with the ILECs, but cannot do so if the ILECs are permitted to file tariffs instead." CTIA claims that ILECs are prohibited from unilaterally filing tariffs to impose interconnection obligations on CMRS carriers that were not reached by agreement" and the Commission has concluded that it would not expect a BOC to file a tariff pertaining to [an] unresolved issue." Finally, according to CTIA, the Petition makes clear that certain rural ILECs are acting in flagrant disregard of the Commission's orders. Rather

[18] ***See CTIA Comments,*** at p. *2*.

[19] ***Ibid.***

[20] *Id*. at **p.** 4.

[21] ***Ibid.***

than negotiate in good faith, ILECs have unilaterally filed wireless termination tariffs in several states.[22]

According to CTIA's logic, the Nebraska Companies and other rural ILECs bypassed the negotiation process mandated by the Act and instead filed wireless termination tariffs instead. This is simply wrong. As the Nebraska Companies stated in its comments, the Nebraska Companies filed tariffs because the language of Section 252(a) of the Act, as well as the Commission's interpretation of Sections 251(b) and 251(c) of the Act, limits ILECs' ability to establish reciprocal compensation agreements with the wireless carriers. While the Nebraska Companies agree with CTIA that ILECs are obligated under the Act to establish reciprocal compensation agreements with wireless carriers, given the language of Section 252(a), ILECs can only take advantage of this statutory provision, if requested. The rural ILECs have filed tariffs in the absence of an agreement that has been caused by the failure of the CMRS carriers to invoke their rights under the Act.

Contrary to the assertion of CTIA, the Petition is all about the CMRS Petitioners' use of indirect trunk groups and their ability to impose a unilateral bill-and-keep regime through the use of indirect connections. Rather than invoking their rights to negotiate, the CMRS Petitioners seek to avoid their legal obligation to pay for services by filing the Petition. They seek to use this Commission process to enable them to essentially abscond with valuable services rather than resolve a legitimate legal issue.

IX. Summary

The Commission should not be fooled into believing the supporters of the CMRS Petitioners' various misleading assertions. The CMRS Petitioners have unilaterally imposed a

[22] *Id.* at p. 5.

bill-and-keep compensation arrangement against the wishes of the Nebraska Companies and other rural ILECs. The CMRS Petitioners and its supporters claim they are willing to negotiate with the rural ILECs, but place the burden upon the ILECs to commence negotiations, contrary to the language of the Act. The CMRS Petitioners and its supporters then excuse their lack of intent to commence negotiations on the "lack of significant traffic" exchanged and the time and expense involved in negotiating individual agreements. The CMRS Petitioners and their supporters, however, argue against a tariff, even though a tariff filing will save them the time and expense of negotiating an individual agreement associated with such "insignificant traffic volumes". Finally, the CMRS Petitioners and their supporters argue that the rates in the tariffs are excessive even though the record shows that the rates are at or below the rates developed according to the pricing standards of the Act and Section 51.505 of Commission rules. Until the CMRS Petitioners and their supporters conclude negotiations or arbitration that result in approved agreements as mandated in the Act, the Commission must allow the Nebraska Companies and other rural ILECs their legal rights to recover their cost of transport and termination associated with CMRS traffic. The Commission can assure those rights absent an agreement by denying the Petition for Declaratory Ruling.

Dated this 31st day of October, 2002.

NEBRASKA RURAL INDEPENDENT
COMPANIES, COMMENTERS,

By: _____

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